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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Implementation of 911 Act

The Use of N11 Codes and Other Abbreviated  
Dialing Arrangements

CC Docket No. 00-110

To: The Commission

Comments of Maritel, Inc.

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## SUMMARY

Maritel, Inc. requests that the Commission preempt state 911 regulations as they apply to Part 80 commercial radio service ("CMRS") providers. Preemption of state 911 regulations as they apply to Part 80 providers is supported by three independent factors. First, several jurisdictional problems related to the roaming of maritime CMRS services exist. For example, the difficulty in separating interstate and intrastate Part 80 CMRS transmissions supports the view that Part 80 CMRS regulations remain under the ambit of FCC authority.

Second, state 911 regulations conflict with federal rules in a regulatory sphere where the federal government has already "occupied the field." When this occurs, state regulations and laws are automatically preempted. Here, state 911 laws conflict with the federal obligations placed on Part 80 providers. Part 80 providers such as Maritel are required to provide emergency communications pursuant to a federally and internationally mandated safety system. Furthermore, in 1996, the Commission exempted Part 80 providers from having to provide 911 service to their customers.

Third, the Commission should preempt state 911 regulations as they apply to Part 80 providers due to the undue burden placed on Part 80 providers by the diversity of requirements that state regulations create. With the high mobility of maritime CMRS use, compliance with multiple and diverse state 911 schemes would be extraordinarily difficult for Part 80 providers. Part 80 providers would be required to continually follow multiple changing legal obligations as maritime CMRS users engage in interstate maritime travel.

Further, Maritel asks that the Commission preempt all state 911 surcharges as they apply to Part 80 providers. When federal regulations occupy the field, federal law may preempt state taxes when a state seeks to assess taxes for governmental functions that do not benefit the taxpayer.

Here, maritime CMRS users and providers do not benefit from the 911 system. Thus, the Commission should preempt states from charging maritime CMRS users with 911 fees.



## I. Background

### A. Maritel

Maritel, licensed under Part 80 of the FCC's rules to offer commercial mobile radio services ("CMRS"),<sup>2</sup> is the largest provider of VHF public coast station ("VPC") services in the United States. Its stations cover most of the coastal United States and U.S. inland waterways, and are comprised of transmitter locations each interconnected to Maritel's control switching office located in Gulfport, Mississippi. Maritel actively participated in the FCC's auction of VPC station licenses, and was the winning bidder for nine regional licenses. Maritel is currently building a North American VPC network that will offer advanced telecommunications services on a cost-effective basis. Upon completion of its VPC network, Maritel will provide state-of-the-art, seamless maritime communications services in all U.S. coastal areas and major inland waterways.

### B. The Notice

The *Notice* is designed to implement the 911 Act<sup>3</sup> and seeks comments on the measures the Commission should take to encourage and support state efforts to deploy comprehensive emergency communications networks based on each state's coordinated plan.<sup>4</sup> The Commission concluded that it might adopt provisions that would not interfere with the "careful balance of responsibilities" between the states and the Commission.

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<sup>2</sup> Part 80 states the conditions under which radio may be licensed and used in the maritime services. Part 80 providers are those CMRS providers that maintain a shipboard radio service to provide telecommunications between ships and other watercraft in coastal and inland waterways or between watercraft and shore-based stations.

<sup>3</sup> Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286 ("911 Act").

<sup>4</sup> *Notice* at ¶ 23.

Maritel believes that it is not subject to the 911 Act and the regulations promulgated thereunder.<sup>5</sup> Nevertheless, as a CMRS operator providing services along most of the U.S. coastline and inland waterways, Maritel is potentially subject to the 911 laws of numerous states. Each state has its own set of regulations designed to implement 911 systems and many states require CMRS providers to comply with state 911 regulations. Thus, Maritel has a strong interest in the relationship between federal and state regulation of 911 services. Accordingly, Maritel is pleased to have the opportunity to submit the following comments in this proceeding.

## **II. Discussion**

### **A. Adoption of a “Model Plan”**

In order to encourage the development of state 911 plans, the Commission suggests that it create a “model” state 911 plan.<sup>6</sup> Maritel supports this approach. It is important that the Commission ensures that state laws are consistent with each other and federal 911 regulations in order to reduce confusion and conflicting requirements for telecommunications carriers. Moreover, Maritel expects that such a model plan would, consistent with the Maritel Petition, potentially relieve Part 80 providers from being required to conform with inconsistent state obligations.

Nevertheless, a model code is only one step that the Commission should take to ensure that states do not impose 911 obligations on Part 80 licensees that are plainly inconsistent with the federal regulatory scheme. If a model plan were adopted, states would not be required to follow it, potentially subjecting Maritel and other Part 80 licensees to regulatory plans inconsistent with their federal obligations. In order for state regulations to remain consistent with the Commission’s

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<sup>5</sup> See, Petition for Reconsideration or Clarification submitted by Maritel (“Maritel Petition”), FCC Docket No. 92-105, 00-110, September 28, 2000.

<sup>6</sup> Notice at ¶ 27.

previously adopted rules and obligations applicable to Part 80 providers, Maritel asks that the FCC preempt the states 911 plans insofar as they apply to Part 80 providers.

## **B. Federal Regulations**

911 Requirements for Wireless Services. In an effort to create a nationwide 911 emergency service system, the FCC promulgated rules requiring common carriers, including wireless common carriers, to provide 911 access for their customers. In its CC Docket No. 94-102 *Report and Order and Further Notice of Proposed Rulemaking* (“R & O”), the FCC stated that users of wireless services should have the ability to reach emergency services by dialing 911 from any service initialized mobile radio handset.<sup>7</sup> This reflected the Commission’s important goal of improving the quality and reliability of 911 services available to the customers of wireless telecommunications service providers.<sup>8</sup>

Part 80 Providers are Exempt From 911 Regulatory Requirements. In 1996, the Commission exempted Part 80 providers such as Maritel from federal 911 regulation, stating:

[We do not believe that it is appropriate to require other two way voice services, such as . . . Public Coast Stations (Part 80, Subpart J) [to provide E911]. These services are provided for passengers and crews of airplanes and ocean vessels. We find that passengers and crews do not rely on ground-based rescue operations. Instead, passengers and crews of ships rely on internationally approved GMDSS.<sup>9</sup>

As a Part 80 maritime licensee, Maritel must comply with both domestic and international distress and emergency regulations unique to the maritime industry.<sup>10</sup> These regulations generally require

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<sup>7</sup> *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 18676, 18682, ¶ 10 (1996) (“R & O”).

<sup>8</sup> *Implementation of 911 Act*, CC Docket No. 92-105, *Fourth Report and Order and Third Notice of Proposed Rulemaking*, ¶ 14 (August 29, 2000).

<sup>9</sup> See R & O, *supra* note 5, at 18717, ¶ 82.

<sup>10</sup> The FCC has stated that these services “provide a vital emergency radio link, similar to the terrestrial 911 system, to ensure safety of life and property in the marine environment.” *Technology for Communications International*, 14 FCC Rcd 16173, ¶ 11 (1999). Thus, while not identical to 911 dialing, the FCC has recognized that maritime emergency and distress calling systems serve the public in a similar fashion.



Maritel to route emergency calls to one of the U.S. Coast Guard's forty-five Search and Rescue Coordination Centers. Routing emergency calls in a different manner would, in most cases, delay assistance to the caller because most land-based emergency dispatch personnel are necessarily not as well trained as the U.S. Coast Guard to respond to emergencies on the high seas or inland waterways.<sup>11</sup>

The boating and commercial shipping and fishing industries have for years been familiar with distress and emergency transmission requirements on the high seas and inland waterways. Imposition of a 911 requirement on VPC licensees would only confuse these radio users, many of whom are also familiar with, and also comply with, internationally-mandated maritime communications safety standards, including the Global Maritime Distress and Safety System ("GMDSS"). GMDSS is an international safety system that was first adopted by the FCC in 1992, and implements the international Safety of Life at Sea ("SOLAS") Convention.<sup>12</sup> GMDSS has no 911 component.

### C. State Regulations

As anticipated by the *Notiae*, states have different statutes and codes implementing 911 systems. Maritel is attaching as Exhibit A hereto, an informal survey summarizing the relevant provisions of state 911 regulations in those geographic areas where Maritel operates or intends to operate in the near future.<sup>13</sup> Because adherence to those codes would be contradictory to the federal

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<sup>11</sup> Most emergency dispatch personnel, to the best of Maritel's knowledge, are not familiar with Coast Guard rescue procedures, maritime terminology, or maritime navigation. By contrast, search and rescue is one of the U.S. Coast Guard's oldest missions; the Coast Guard averages over 50,000 emergency responses per year, nationwide, and is considered a worldwide leader in the field of search and rescue.

<sup>12</sup> *Amendment of Parts 13 and 80 of the Commission's Rules to Implement the Global Maritime Distress and Safety System (GMDSS) to Improve the Safety of Life at Sea, Report and Order*, 7 FCC Rcd 951 (1992).

<sup>13</sup> The survey is attached for illustrative purposes only. Maritel conducted the survey to tentatively assess its state law 911-related obligations. If the FCC determines that Maritel is subject to state 911 regulatory schemes, Maritel would more thoroughly assess its obligations.

framework for 911 services, Maritel asks the Commission to preempt these state laws and regulations, to the extent that they apply to the provision of Part 80 VPC services.

State 911 regulations fall generally into three different categories. The first category ("Category One") encompasses state statutes or codes that require CMRS providers, including Maritel, to provide a 911 or E-911 service to its customers.<sup>14</sup> California, for example, requires every facilities-based service provider to provide access for end users on their system to the local emergency telephone services.<sup>15</sup> According to the California Code, these providers must utilize the 911 code as the primary access number for these services.<sup>16</sup> There are no provisions in the Code that exempt Part 80 telecommunications carriers from providing 911 emergency service access.

Also according to the California Code, each service supplier must collect a surcharge from its users to cover this program.<sup>17</sup> The service supplier is expected to pay the funds collected to the State Board of Equalization.<sup>18</sup> Maritel may be considered a "service supplier" in California because it supplies intrastate telephone communication services to service users in California.<sup>19</sup> Thus, if Maritel were considered a service supplier in California, it would be unjustly burdened to collect and remit funds for a 911 system in which it should not be included.

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<sup>14</sup> Twenty-four of those states surveyed fall within Category One. These states include Alabama, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Minnesota, Missouri, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia and Wisconsin.

<sup>15</sup> See Cal. Pub. Util. Code § 2892 (1997).

<sup>16</sup> See Cal. Gov. Code § 53111 (1997).

<sup>17</sup> See Cal. Rev. & Tax Code § 41021 (1997).

<sup>18</sup> See Cal. Rev. & Tax Code § 41051 (1997).

<sup>19</sup> See Cal. Rev. & Tax Code § 41007 (1997).

Similarly, under Georgia's "Emergency Telephone Number '911' Service Act of 1977"<sup>20</sup> Maritel is a service supplier providing wireless service to telephone subscribers.<sup>21</sup> Consequently, Maritel must allow its customers to utilize 911 emergency service and is responsible for collecting a 911 charge from its Georgia subscribers.

In Maine, 911 is the primary number to be used in a telephone exchange to request emergency services.<sup>22</sup> Maritel, as a wireless telecommunications provider, is part of the telephone exchange and must arguably provide 911 service. Maritel must also collect a monthly surcharge per line from each of its customers and remit it to the Treasurer of State.<sup>23</sup>

The second category of state 911 regulations ("Category Two") is comprised of those states that do not appear to require Maritel to provide 911 service.<sup>24</sup> Although these states' regulations do not conflict with federal 911 regulations, they pose a different, albeit equally significant, problem. These statutes, together with state regulations that impose 911 obligations and those statutes that are unclear, produce an inconsistent tapestry of state regulations. As discussed more thoroughly below, all state 911 laws should be preempted as applied to Part 80 providers because this inconsistency creates an undue burden on Part 80 providers.

Several states fall in Category Two. For example, no regulations mandate Maritel's participation in Iowa's E911 program. The Iowa Code is limited, with respect to 911 issues, to the

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<sup>20</sup> See Ga. Code Ann. § 46-5-120 (1998).

<sup>21</sup> The Georgia Code defines "service supplier" as a person or entity who provides local exchange telephone service or wireless service to a telephone subscriber. Ga. Code Ann. § 46-5-122(9) (1998).

<sup>22</sup> See Me. Rev. Stat. Ann. tit. 25, § 2932 (2000).

<sup>23</sup> See Me. Rev. Stat. Ann. tit. 25, § 2927 (2000).

<sup>24</sup> Thirteen of those states surveyed fall within Category Two. These states include Alaska, Delaware, Hawaii, Iowa, Massachusetts, Nebraska, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota and Washington.

delegation of certain powers to a joint E911 service board for the collection of 911 service program surcharges.<sup>25</sup> The Code does not require 911 to be the primary emergency services telephone number for Iowa or that telecommunications providers provide access to such services. Massachusetts has also refrained from mandating 911 requirements on CMRS operators such as Maritel. According to Massachusetts law, each telephone company providing local exchange service in the state is required to provide and maintain enhanced 911 service.<sup>26</sup> However, because Maritel does not provide local exchange service, it is not required to provide 911 services.

The third category of states represented in Maritel's survey ("Category Three") consists of states with vague rules and regulations.<sup>27</sup> States with vague requirements make it difficult for Maritel to determine whether it is required to maintain 911 services. For example, the Mississippi Code states that "no CMRS provider shall be required to provide 911 service" until three prerequisites are met.<sup>28</sup> However, there are no provisions stating that CMRS providers are actually required to provide 911 service thereafter. The state regulations only imply that CMRS providers may be required to provide 911 service. Consequently, the wording of the statute makes it unclear as to whether Maritel would subsequently be required to provide 911 services or if it simply has the power to choose whether it desires to provide 911 services.

Further, Maritel is subject to Mississippi's service charge regulations if it is considered to provide a 911-like service. However, there are no regulations or legislative history to further clarify the term "911-like" in Mississippi law. If Maritel's ability to connect an emergency caller with the

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<sup>25</sup> See Iowa Code § 34A.2A, § 34.7A (1999).

<sup>26</sup> See Mass. Gen. Laws ch. 166, § 14A (1997).

<sup>27</sup> Six of those states surveyed fall within Category Three. They include Louisiana, Maryland, Michigan, Mississippi, Puerto Rico and West Virginia.

<sup>28</sup> See MS S.B. 2821 § 5 (1998).

Coast Guard in an emergency situation is considered part of a 911-like service, then Maritel qualifies as a CMRS provider and is consequently required to collect a service charge from its users in Mississippi. However, no guidance exists on this point.

Maryland law also presents vague requirements. Maryland law establishes 911 as the primary emergency service number, which must be accessible via wireless telephone services.<sup>29</sup> Under Maryland law, a “wireless telephone service” “does not include any service that *cannot* connect a person dialing the digits 911 to an established public safety answering point under the 911 system.”<sup>30</sup> It is unclear, therefore, whether Maritel’s current inability (as well as its belief, as stated in the Maritel Petition, that it is not required) to provide 911 service excludes Maritel from Maryland’s requirements.

Certain states provide that 911 is the primary emergency service number in areas where local authorities so decree. For example, in Michigan, whether Maritel is required to maintain access to a 911 emergency response system depends upon the decisions of the individual county boards.<sup>31</sup> The Michigan Act does not make 911 access a requirement for Maritel unless a county or service district authorizes the requirement itself. Thus, Maritel may also be subject to diverse 911 regulations within a particular state.

Based on the foregoing, Maritel seeks preemption of all Category Three state 911 regulations as applied to Part 80 providers because they contribute to the confusing array of state 911 regulations applicable to Part 80 CMRS licensees.

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<sup>29</sup> Md. Ann. Code art. 41, § 18-102 (1998).

<sup>30</sup> Md. Ann. Code art. 41, § 18-101(f)(14)(iii) (1998) (emphasis added).

<sup>31</sup> Mich. Comp. Laws § 22.1467(201b) (1997) [Mich. Comp. Laws § 484.1201b (1997)].

#### **D. FCC Should Preempt State 911 Regulations as They Apply to Part 80 Providers**

The results of the above-referenced survey reveal that certain state law schemes mandating 911 requirements may unwittingly cover or affect Part 80 providers that are otherwise exempt from comparable federal 911 obligations. Two particular elements of state 911 regulations adversely affect Maritel and should be preempted: (i) state regulations that require carriers to reserve 911 as the primary access number for emergency services and (ii) those state regulations that require carriers to collect 911 surcharges from their customers and remit those charges to the states.

Preemption of state regulations applicable to Part 80 providers is necessary to fulfill the national policy promoting the development and implementation of maritime emergency services. Preemption of state 911 access rules is supported by three factors: 1) jurisdictional problems related to the roaming of maritime CMRS services; 2) conflicting state 911 regulations in a sphere where the federal government has already “occupied the field” of regulatory authority; and 3) the undue burden placed on Part 80 providers due to the diversity of requirements that state regulations create. Further, state 911 surcharges should be preempted as they apply to Part 80 providers because maritime CMRS users and providers do not benefit from the 911 system.

States Do Not Have 911 Jurisdiction Over Part 80 Providers. The Commission has jurisdiction over interstate communications services.<sup>32</sup> Services offered under Part 80 of the FCC’s rules are interstate in nature. Even though a particular Part 80 service may contain intrastate elements, it must be viewed as a whole for regulatory purposes.<sup>33</sup> The Commission may exercise jurisdiction over communications when it proves to be technically and practically difficult to

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<sup>32</sup> See *Ambassador, Inc. v. FCC*, 325 U.S. 317, 320-21 (1945) (sustaining the Commission’s finding that it has jurisdiction over interstate services).

<sup>33</sup> See *New York Telephone Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980) (quoting *General Telephone Co. v. FCC*, 413 F.2d 390, 398)).

separate the intrastate from the interstate services.<sup>34</sup> It would be technically difficult and inefficient to require Part 80 providers to separate interstate and intrastate transmissions so that they could impose different charges or implement different technical schemes.<sup>35</sup> Overall, state regulation of 911 use and surcharges on Part 80 providers' customers would impede the rapid development of a nationwide maritime communications service as well as increase carriers' expense in providing that service.<sup>36</sup>

Further, states may not regulate communications that occur over water where the federal government has already regulated in the area.<sup>37</sup> According to the Supreme Court,

One thing . . . is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.<sup>38</sup>

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<sup>34</sup> See *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978) (stating that the Commission properly recognized that it may regulate facilities used in both inter- and intra-state communications to the extent it proves "technically and practically difficult" to separate the two types of communications).

<sup>35</sup> See *id.*; *Third Report and Order*, Docket No. 80-183, 97 F.C.C.2d 900-908 (May 24, 1984) ("*Third R & O*"); see also *Petition for an Expedited Declaratory Ruling Filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, FCC 93-45, *Memorandum Opinion and Order*, 702, ¶ 21 (January 22, 1993) (a LEC originating a 900 services call is unable to determine whether the call is interstate or intrastate, and thus it is unable to identify and block 900 calls on a jurisdictional basis).

<sup>36</sup> See *Third R & O*; see also *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 791-92 (4th Cir. 1976), *cert. denied*, 429 U.S. 127 (1976) (stating that if a state's jurisdiction over intrastate communication facilities is exercised in a way that restricts the FCC's goal of empowering the creation of wire services, the Commission will be frustrated in the exercise of its plenary jurisdiction over the rendition of interstate and foreign communication services).

<sup>37</sup> *U.S. v. Locke*, 120 S. Ct. 1135, 1143 (2000) (citing *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. For Relief of Distressed Pilots*, 53 U.S. 299 (1852)) (stating that state vessel requirements are preempted by federal laws which governed the certification of vessels and standards of operation).

<sup>38</sup> *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna*, 88 U.S. 558, 575 (1875)).

Because the Commission has already required Maritel to adhere to a different, detailed safety scheme, the states have no power to enforce their own regulations on Part 80 providers.<sup>39</sup>

Even if the Commission had not already regulated in this area, as a practical matter, states should still not be allowed to enforce 911 requirements on Part 80 providers. Part 80 providers' customers make calls in a high-mobility maritime environment. It would therefore be difficult, if not impossible, for Part 80 providers to realize which state has jurisdiction at any given time and to which regulatory scheme it should adhere. The mobility of CMRS use on land already leads to jurisdictional confusion.<sup>40</sup> This has been noted in a recent Congressional debate regarding the taxation of wireless telecommunications usage. According to Charles W. Pickering, a congressional representative from the State of Mississippi:

Different jurisdictions may follow different methodologies making the determination of the correct taxation very difficult. Depending on the methodology, a call could be taxed in the city where the customer is located, in the town where the wireless antenna is located, or, even in the city where the wireless switch is located. The bottom line . . . it's confusing, it's costly and it's a problem . . .<sup>41</sup>

While land-oriented mobile devices create difficult jurisdictional problems, the mobility of Part 80 users on the water makes enforcement even more complex.<sup>42</sup> To ameliorate this problem, the FCC should maintain uniform requirements for maritime CMRS use by preempting state 911 laws as they apply to Part 80 providers.

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<sup>39</sup> See *Locke*, 120 S. Ct. at 1143.

<sup>40</sup> As recently as May 4, 2000, Congress was still debating on how to tax wireless telecommunications use. See Wireless Telecommunications Sourcing and Privacy Act, Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 106<sup>th</sup> Cong., available at <http://www.house.gov/judiciary/pick0504.htm> (statement of Rep. Charles W. Pickering).

<sup>41</sup> *Id.*

<sup>42</sup> Not only is the determination of jurisdictions among states difficult vis-à-vis another, but also among foreign states.



FCC Has Occupied The Field Regarding Part 80 CMRS Regulation. The Commission may preempt state 911 laws as they apply to Part 80 providers because the Commission's authority "occupies" this field of regulation.<sup>43</sup> Congressional intent to exclusively occupy a field of regulation, and thereby preempt state law, can be implied where Congress has regulated so pervasively in the field as not to leave any room within which a state may act.<sup>44</sup> In other words, where the dominance of federal intervention in a field is such that any state law addressing the field would duplicate or be in direct conflict with federal law, Congress is held to have intended to preempt the field.<sup>45</sup>

It is clear that Congress intended to occupy the field of telecommunications regulation in general and maritime telecommunications regulation in particular. The Communications Act of 1934, as amended, covers the regulation of telecommunications service providers. Specifically, Title III of the Act regulates interstate radio use. Furthermore, Parts II and III of Title III regulate maritime radio use. Part 80 of the FCC's regulations contains, in explicit detail, requirements to which maritime carriers must adhere in a variety of contexts and particularly in emergency situations.

When Congress occupies a field of regulation, federal preemption may occur whenever state action creates an obstacle to the implementation of FCC regulations.<sup>46</sup> Thus, if state 911 regulations

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<sup>43</sup> See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (holding that when federal regulations are pervasive, it is possible to make a reasonable inference that Congress left no room for the states to supplement it); *Nat'l Ass'n of Regulatory Comm'rs v. FCC*, 525 F.2d 630, 646 (D.C. Cir. 1976) ("any state regulation inconsistent with the policy adopted [by the FCC] may be pre-empted, unless such pre-emption is explicitly prohibited by statute).

<sup>44</sup> See *id.*

<sup>45</sup> See e.g. *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (finding that Congressional intent is evident by a pervasive regulatory scheme).

<sup>46</sup> State laws and regulations are considered void if compliance with both state law and federal law is infeasible or where compliance with state law will obstruct Congressional objectives. See *Boggs v. Boggs*, 117 S. Ct. 1754 (1997) (holding that federal law preempts state law where state law conflicts with federal regulatory provisions). Conflict preemption exists where state law either makes it "impossible for [a party] to comply with both federal and state law" or would "frustrate the accomplishment and execution of the full purposes and objectives of Congress." See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (quoting *Hines v.*

negate valid FCC regulatory goals, the Commission is justified in preempting them.<sup>47</sup> Further, in determining whether state law conflicts with the federal law, the Court must look to the effect, rather than the purpose of the state law.<sup>48</sup> Section 332(3)(A) of the Act preempts state authority to regulate the entry of, or the rates charged by, any CMRS provider while reserving to the states the ability to regulate other terms and conditions of CMRS. However, when the Commission, under duly delegated congressional authority, creates its own terms and conditions for CMRS providers, any conflicting state law is considered void.

The Commission requires Part 80 licensees to provide particular safety services to maritime users. As Maritel pointed out in the Maritel Petition, the Commission exempted maritime CMRS operators such as Maritel from 911 requirements. However, several states continue to require maritime CMRS providers to allow their customers to access emergency services by dialing 911. In

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*Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Fidelity Fed. Sav. and Loan Ass'n*, 458 U.S. at 152-53 (1982) (finding that Congressional intent is evident by a pervasive regulatory scheme); *Digital Termination Systems*, 86 FCC 2d 360, 389-90, ¶ 80 (1981) (finding that the authority to preempt state regulation when state regulation could interfere with interstate communications has been consistently articulated both by the Commission and the courts).

<sup>47</sup> It is clear that Section 154(i) of the Telecommunications Act gives the FCC power to preempt state regulation that is inconsistent with, or stands in the way of the achievement of, federal policies. Telecommunications Act of 1996, § 154(i), Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at scattered sections of 47 U.S.C.). See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (holding that a federal agency acting within the scope of congressionally delegated authority to that effect may preempt state regulation). Further, the Supreme Court recognized that, "in the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992). The U.S. Court of Appeals for the D.C. Circuit has further stated that "any state regulation inconsistent with the policy adopted [by the FCC] may be pre-empted, unless such pre-emption is explicitly prohibited by statute." *Nat'l Ass'n of Regulatory Comm'ns v. FCC*, 525 F.2d 630, 646 (D.C. Cir. 1976).

<sup>48</sup> See *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (instructing the lower courts "to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written"); see also *New York State Commission on Cable Television v. FCC*, 669 F.2d 58, 62 (2d Cir. 1982) (citing *Perez v. Campbell*, 402 U.S. 637, 652, (1971)) ("In determining whether it conflicts with the federal law, the Court must look to the effect, rather than the purpose of the state law).

fact, no state statute mentions that certain air<sup>49</sup> and maritime CMRS providers should be exempted from their 911 plans. The lack of any Part 80 exemptions at the state level creates a conflict between state and federal regulations. Thus, although the federal government has attempted to exempt Part 80 providers from 911 emergency service requirements, Part 80 providers are still subject to these requirements in numerous states, rendering the Commission's important exemption illusory.

States may argue that 911 regulations on Part 80 providers do not conflict with the FCC's goals because they would simply require that Part 80 providers provide 911 access as an additional emergency service. However, if Part 80 providers such as Maritel supplied more than one emergency service through their systems, dangerous situations would worsen due to customer confusion. Maritel's customers rely on Maritel's system to quickly and efficiently connect to emergency services such as the Coast Guard, the only maritime emergency service provider. With the addition of 911 as an emergency service number, Part 80 providers' customers would be reaching a land-locked emergency service team that could not help them, thus delaying the time they may be rendered assistance from a more appropriate source.

State Law Diversity Creates an Undue Burden on Part 80 Providers. Finally, the FCC may preempt the states' application of local 911 regulations to Part 80 providers under the dormant commerce clause doctrine.<sup>50</sup> According to this doctrine, state laws may be invalidated if courts find

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<sup>49</sup> In its *R&O*, the Commission also exempted Air-to-Ground two way voice services (as regulated by 47 CFR Part 22, Subpart M) from having to provide 911 service for the same reason as exempting Part 80 providers. See *R&O*, *supra* note 5, at 18717, ¶ 82. If an emergency occurred on an airplane, it would be unreasonable to believe that an airborne CMRS user could summon help from the local sheriff several thousand feet below him. Maritime CMRS users are similarly situated and may only receive sufficient emergency services from the Coast Guard accessible via GMDSS.

<sup>50</sup> The dormant commerce clause is a term of art stemming from the Supremacy Clause of the United States Constitution. See U.S. Const., art. VI; see also *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (stating that the Supremacy Clause invalidates state laws that "interfere with, or are contrary to the laws of Congress . . ."); *Alessi v. Raybestos-Manhattan, Inc.* 451 U.S. 504, 522-23 (1981).

that the state laws unduly burden interstate commerce.<sup>51</sup> A legitimate state regulation must not burden interstate commerce, in either purpose or effect, unless the extent of that burden is outweighed by a legitimate state objective that cannot be achieved in a less burdensome manner.<sup>52</sup> State laws that appear to be genuinely nondiscriminatory because they do not impose disparate treatment on similarly situated in-state and out-of-state interests, still sometimes undermine a compelling need for national uniformity in regulation.<sup>53</sup>

Requiring Part 80 providers to comply with state 911 schemes would be difficult and costly for Part 80 providers and hazardous to the safety of maritime CMRS users. Part 80 providers would be required to continually follow multiple changing legal obligations as maritime CMRS users engage in interstate maritime travel. The attached state survey highlights the differences between state 911 laws. Category One states require Part 80 providers to provide 911 service while Category Two states do not. Category Three states may or may not require Part 80 providers to provide 911 service. Traversing waters across the boundaries of states within different categories would present difficult problems.

Such state regulations should preempted unless local benefits outweigh the burden on interstate commerce.<sup>54</sup> However, the local benefit for having maritime CMRS users access state 911

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<sup>51</sup> *Pike v. Bruce Church*, 397 U.S. 137 (1970) (invalidating a state official's order regarding cantaloupe packaging as burdensome on interstate commerce).

<sup>52</sup> *See id.* at 142.

<sup>53</sup> *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (conflict in state laws governing truck mud flaps); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (train lengths); *see also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987) ("This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations").

<sup>54</sup> Nondiscriminatory regulations that have only incidental effects on interstate commerce are valid "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. 93 (1994) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

services does not outweigh the interest of maintaining the more safer and efficient alternative of established maritime safety procedures.

**E. State 911 Surcharges Should Be Preempted As They Apply to Part 80 CMRS Users**

Under most state statutes, telecommunications carriers, including CMRS providers, are required to bill their customers a 911 surcharge and remit it to the state commission. The purpose of these surcharges is to help fund the states' 911 emergency telephone systems. Because Part 80 CMRS users would not benefit from the 911 system (if the Commission preempts state 911 laws as they apply to Part 80 providers), they should not be required to pay the 911 surcharges.<sup>55</sup>

According to the Supreme Court, pervasive federal regulations preclude a state's generalized interest in raising revenue.<sup>56</sup> When federal regulations occupy the field, federal law may preempt state taxes when a state is "unable to identify any regulatory function or service performed by the state that would justify the assessment of taxes for [certain] activities."<sup>57</sup> Here, the state's interest in raising revenue for 911 services is insufficient to permit its intrusion into the federal regulatory scheme with respect to Part 80 emergency services. This is not a case in which states seek to assess taxes in return for governmental functions it performs for those on whom the taxes fall.<sup>58</sup> Thus, surcharges imposed on Part 80 CMRS users are unjustified.<sup>59</sup>

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<sup>55</sup> Other CMRS licensees and their customers are not assessed fees to underwrite the costs of Part 80 providers' compliance with Coast Guard related emergency communication regulations. Thus, by not preempting state 911 fees, the FCC would be sustaining an imbalanced subsidy scheme.

<sup>56</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150 (1980) ("We do not believe that respondents' generalized interest in raising revenue is . . . sufficient to permit its proposed intrusion into the federal regulatory scheme).

<sup>57</sup> *Id.* at 148-49.

<sup>58</sup> *See id.* at 150.

<sup>59</sup> *See id.* at 150 (stating that where a pervasive federal regulatory scheme exists, states are not justified in imposing taxes on those who do not benefit from purpose of the tax).


### **III. Conclusion**

Preemption of state 911 regulations over Part 80 providers is necessary to uphold the Commission's goal of providing a national emergency service system for maritime-based telecommunications facilities. Thus, Maritel urges the FCC to take such action consistent with Maritel's position that state 911 regulatory schemes may be in conflict with Part 80 requirements for maritime CMRS providers. The Commission should preempt all state 911 regulations as they apply to Part 80 CMRS providers, including connection and surcharge requirements. Otherwise, state 911 regulations will create jurisdictional dilemmas, conflicting obligations, and undue burdens for Part 80 providers.

WHEREFORE, THE PREMISES CONSIDERED, Maritel respectfully submits the foregoing Comments and asks the Commission to act in a manner consistent with the views expressed therein.

Respectfully Submitted,

**Maritel, Inc.**

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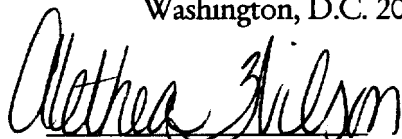
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## CERTIFICATE OF SERVICE

I, Alethea Wilson, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 16th day of October, 2000, caused to be sent by First Class U.S. mail, postage prepaid, a copy of the foregoing Comment to the following:

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Alethea Wilson



# Exhibit A